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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 508.

S. H. KRESS & COMPANY,

Petitioner,

vs.

ELIE P. AGHNIDES and CHASE BRASS & COPPER CO., INC.,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI.

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JURISDICTION.

No actual basis now exists for invoking this Court's jurisdiction relative to the pendency of substantial litigation in the Second and Fourth Circuits involving the Aghnides patent 2,210,846. Since the patent has expired, the *Marshall Metal Products v. Aghnides* case, Civil Action 85-272 in the District Court for the Southern District of New York, has been dismissed with prejudice by the Court October 14, 1957, and the *Aghnides v. Holden et al.* case, Civil Action 50 C 1022 in the District Court for Northern Illinois, Eastern Division, has been dismissed with prejudice by the Court October 17, 1957. The *Melard Mfg. Corp. v. Aghnides* case in the District Court for the Southern District of New York, Civil Action 93-355, and *Melard Mfg. Corp. v. Chase et al.*, Civil Action 55 C 84 in the District Court for Northern Illinois, Eastern Division,

involve the same parties or their privies and the same patent as the present case,* and as to those parties the question of validity of said patent is *res adjudicata*.

There is no issue in this case involving the International Patent Convention, and hence no international treaty issue which this Court need determine, as will be readily apparent from a true appraisal of the accepted facts.

RESPONDENTS' STATEMENT OF QUESTIONS PRESENTED.

I. Where the trial judge, long after conclusion of the trial, denies a motion to reopen on the ground (for which there was no basis in the record), that plaintiff had made representations in the Canadian Patent Office allegedly contrary to representations in the U. S. Patent Office fully supported by the trial record, and the Court of Appeals in affirming the denial of the motion independently considers the merits of the matter on which the motion is based, should the Supreme Court grant certiorari to determine whether the motion to reopen was properly denied?

II. Is there a conflict of decisions with respect to validity of a patent in the Seventh and Fourth Circuits requiring determination by the Supreme Court, where the Fourth Circuit has specifically pointed out that their decision was based on a different and later record containing new visual evidence disproving the conclusions drawn by the Court in the Seventh Circuit, and where the patent involved is now expired and the only litiga-

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* The District Court held (1 App. 104) that Melard conducted the defense and was bound by the judgment against Kress. This finding was not appealed to the Court of Appeals for the Fourth Circuit.

tion still pending involving said patent is between the same parties as in the Fourth Circuit case, or their privies?

The collateral question relating to Figure 8 of the patent attempted to be presented by petitioner is a question which need not be determined by this Court, since petitioner's contention on this question was the specific subject of a petition for rehearing which was denied with opinion by the Court of Appeals below.

STATEMENT OF FACTS.

Petitioner's "Statement of Facts" relevant to question I contains misleading statements and unfounded conclusions. Aghnides' original specification (2 App. 50) * of his December 31, 1937 patent application, which resulted in U. S. patent 2,210,846, stated that "this application is a continuation in part of my earlier application Serial No. 52,923, filed December 4, 1935," which corresponded to the Belgian application. The original oath of the 1937 application stated that the annexed specification discloses and claims "**certain matters**** derived from an earlier application filed by him on December 4, 1935, Serial No. 52,923." The Aghnides British patent was cited later by the U. S. Patent Office (2 App. 71), and in response Aghnides called attention to the fact that the specification of his 1937 application set forth that it was "a continuation in part of my earlier application Serial No. 42,923" and pointed out that the British patent was therefore not a proper reference since it corresponded to the earlier appli-

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* "1 App. ___" and "2 App. ___" refer to Volumes I and II, respectively, of Appellant's Appendix before the Court of Appeals of the Fourth Circuit. "PA ___" refers to Appellee's Appendix before that Court. "Appendix ___ page ___" refers to the appendices printed at the end of Appellant's Petition for Certiorari.

** Emphasis supplied.

cation. The British patent was not reasserted by the U. S. Patent Office.

Thus, there is no factual foundation here for petitioner's conclusion that the British patent "would have been insurmountable opposition to the issuance of a patent."

Petitioner's Statement of Facts relevant to Question II is incomplete to say the least. Finding XXVII(f) of the District Court below, which the Court of Appeals held was fully supported by the evidence, refers to the Felten's specification, as follows:

> "Not only was it demonstrated that Felten's result is different but that he secures his result by different elements and by a different mode of operation. The patent states that the result is secured by means of a 'conically widening chamber e, the widening of which produces in a well known manner the suction of the gas from the perforation d owing to the flow of the liquid from the perforation c into the widened chamber e.' (Felten Patent, p. 1, line 28). This has no counterpart in Aghnides. Felten, to secure his result, must keep the chamber flooded—the exact opposite of Aghnides. * * *" (Appendix A, p. vi.)

Petitioner's statement that the U. S. Fuss patent shows Felten's mixing device mounted at the discharge end of an ordinary home faucet should be completed by pointing out that the suction inlet to the device is connected to a closed chamber for creating a partial vacuum therein (2 App. 304).

Petitioner's statement, that tests of a Felten device before the Trial Court showed that it delivered a non-splash bubbly stream of air and water, ignores the observations of the District Court below based on the tests (1 App. 98):

"Felten as shown above did not produce aerated water. He did not seek that result. He was endeavoring to provide a vacuum pump. This necessitated the flooding of the chamber to create vacuum, the exact opposite of Aghnides Patents in suit. He did not obtain aerated water, nor a coherent, splashless stream. There is nothing in Felten to indicate he was concerned at all in these results. This applies to Aghnides 1,912,113, and to Fuss Patent 1,090,044."

Petitioner's statement, that the holding of the Fourth Circuit Court of Appeals that Figure 8 of patent 2,210,846 is outside the scope of the claims is in direct conflict with the Opinion of the Court of Appeals for the Seventh Circuit, is not correct. The Seventh Circuit held that Felten (not Figure 8) reads literally on the claims, and that one form of Aghnides may be used as a vacuum pump.

ARGUMENT.

I. The Alleged Patent Misuse or Fraud Under the International Patent Convention.

The so-called issue of patent misuse, or fraud, is not an issue under the International Patent Convention because while Aghnides claimed the priority date of his Belgian patent in the United States he could not and did not claim it in Canada. His Canadian application was filed five years after the filing date of his Belgian application, so that the Convention did not apply.

This issue was not tried below but was the subject of a motion, filed by petitioner almost two months after the evidence was closed by both sides, to reopen the case in the District Court. The District Judge denied the motion, citing *Marconi Wireless Co. v. U. S.*, 320 U. S. 1, 47, 48, as authority for the decision being within his sound discretion, and held in effect that there was no fraud.

The Court of Appeals for the Fourth Circuit gave the matter special consideration and held (Appendix A, pp. xii-xiii):

> "In this case, we are the more strongly disinclined to interfere with Judge Hayes' exercise of discretion, because on the documents before us, we fully agree with his comment that **even if the case were reopened, the proffered testimony would not alter the result.** From our own examination of the United States patent '846 and the Belgian patent, **we think it unquestionably true that they are, as Aghnides told the United States Patent Office, the same invention.** Whether or not on another occasion Aghnides made an inconsistent claim in Canada to obtain a patent there, is an issue that we need not decide. If he made a misstatement there, this might bear upon the validity of his Canadian patent. It would not alter the fact that what he told the United States Patent Office was the truth and that the patent here was obtained without deception or fraud." (Emphasis added.)

(1) The contention that Aghnides falsified to the U. S. Patent Office is completely answered by the fact that the U. S. Patent Office decided that Aghnides was entitled to the Belgian priority, and both the Courts below concurred. At the trial in the District Court a model constructed exactly in accordance with Fig. 1 of the Belgian patent was demonstrated to perform precisely the same as a model constructed in accordance with patent No. 2,210,846.

(2) In *Precision Instrument Mfg. Co. v. Automotive*, 324 U. S. 806, the District Court in the exercise of its discretion found gross and manifest fraud, and the Supreme Court sustained the District Court. Here the Supreme Court is asked to reverse the finding of no fraud by the

District Court in the exercise of its discretion, which finding was sustained by the Court of Appeals.

In the words of the District Court below, the belated motion to reopen the case on the ground of newly discovered evidence had for its main purpose "to produce evidence of statements made by Aghnides to the Canadian Patent Office and to impeach or contradict the evidence of Aghnides." (1 App. 92.) The District Court decided that the new evidence would not change his views. The Court of Appeals said specifically, "we fully agree with his comment that even if the case were reopened, the proffered testimony would not alter the result."

Similarly, in *Tracy v. Terminal R. Assoc.*, 170 F. 2d 635, 640 (C. A. 8, 1948), the Court held that newly discovered evidence must be of such weight and nature that if added to evidence already in the case it would probably change the result of trial. Again in *United States v. Bransen*, 142 F. 2d 232, 235 (C. A. 9, 1944) the Court held that allegedly newly discovered evidence which would not materially change the result and which is in a large part not newly discovered at all, is not ground for a new trial. This case also significantly held that the application will be denied where it appears that the degree of activity or diligence which led to the discovery of evidence after trial would have just as easily have produced the evidence, had it been exercised prior to trial. In *Miller v. Kentucky*, 40 F. (2d) 820, 822 (C. A. 6, 1930) the Court held that newly discovered evidence which tends merely to affect the weight and credibility of evidence in the case does not constitute proper basis for a new trial.

(3) The so-called false pre-trial testimony was simply a natural mistake of one who had many patent applications in many countries. There is no evidence that it was made to cover up or hide anything.

Petitioner had ample opportunity to examine Aghnides during the trial, and did in fact examine him at length on the subject of the Belgian patent at each of three trial sessions in the course of a period of a year.

The case of *Keystone Driller Co. v. General Excavator Co.*, 290 U. S. 240, 245, holds:

> "But courts of equity do not make the quality of suitors the test. They apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication."

In the present case the Court of Appeals for the Fourth Circuit gave special consideration to this matter of alleged fraud, and held in effect that Aghnides' statements in Canada had no **immediate and necessary relation** to the equitable relations between the parties in respect to the matter brought before the court for adjudication, to wit, the validity and infringement of U. S. Patent 2,210,846.

(4) There has been no **misuse** of the International Patent Convention to claim one date of invention in the U. S., and a different date in Canada. In the Canadian application the Convention was not used to claim priority based on the Belgian filing date.

Moreover, Article 4 *bis* of the International Patent Convention (Appendix D, page xxxvii) itself provides:

"(1) Patents applied for in the various countries of the Union by persons entitled to the benefits of the Union shall be independent of the patents obtained for the same invention in other countries, whether or not such countries be parties to the Union.

"(2) This stipulation must receive a strict interpretation; in particular, it shall be understood to mean that patents applied for during the period of priority are independent, both as regards the grounds for refusal and **revocation** and as regards their normal duration." (Emphasis added.)

The Fourth Circuit committed no error of law in declining to find Aghnides' representations in Canada, even if untrue, constituted such unclean hands as to disentitle him to the relief sought. They said that if he made a misstatement in Canada, such might bear upon the validity of his Canadian patent, but would not alter the fact that he told the U. S. Patent Office the truth, and that his U. S. patent was obtained without deception or fraud.

The Fourth Circuit decision is not in direct conflict with the rule of law of *Jungersen v. Baden et al.* (CA 2), 166 F. 2d 807, cited by the Petitioner. In that case the Court said that the inventor's appraisal in a foreign patent of his invention in the United States was important. There, the appraisal was also supported by the prior art, and there was no proof to the contrary. Here, the statements by Aghnides in his Canadian application were actually made by his solicitors in the course of argument to the Canadian Patent Office.

The case of *Sarazin et al. v. Wright Aeronautical Corp.*, 54 F. Supp. 244, 251, cited by petitioner, merely holds that statements in foreign applications may be received in evidence as admissions against interest.

Petitioner has attempted to inject the issue of an International treaty in this case by arguing that in some way the grant of Aghnides' U. S. patent provided the means to perpetrate a fraud on Canada. We fail to see how any treaty is involved, regardless of what Aghnides said in Canada. All of the information needed to determine the relationship and effect of the several Aghnides applications was before the Canadian Patent Office, including the fact that the U. S. application claimed the priority of the Belgian application. The effect of the Belgian patent upon the Canadian application was a matter for **independent** determination by the Canadian Patent Office. The weight given by the Canadian Patent Office to acts of the United States Patent Office in a corresponding application is again a matter within the sole discretion of the Canadian Patent Office.

Regardless of what was said by way of argument in the Canadian Patent Office, the facts before it were that in the corresponding U. S. application which had resulted in U. S. patent 2,210,846, priority based on the Belgian application was claimed under the Convention, and that claims conforming to the U. S. patent claims were being asserted in the Canadian application, where priority based on the Belgian application was not and could not be claimed because the Canadian filing date was five years after the Belgian filing date. The Canadian Patent Office had previously cited an Aghnides British patent which was the counterpart of the Belgian patent. If the Canadian Patent Office chose to ignore or disagree with the U. S. Patent Office as to the effect of the Belgian patent or its British counterpart on the claims being asserted in the Canadian application, that is clearly a matter for independent determination by the Canadian Patent Office.

Thus, Aghnides has done nothing in derogation to the intent and purpose of an international treaty; in the United States he has validly claimed priority of his Belgian patent under the International Patent Convention, and in Canada he has not claimed such priority; so that petitioner's attempt to inject into this case the obligations of the United States to support the "public welfare" purposes of international treaties has no substance.

II. The Conflict Between the Seventh and Fourth Circuits.

The case of *Universal Oil Co. v. Globe Oil Co.*, 322 U. S. 471, 473, cited by petitioner, holds that the Supreme Court will grant certiorari to resolve conflicting decisions between Circuit Courts of Appeals as to the same patent and upon substantially the *same set of facts.*

In the present case the Court of Appeals for the Fourth Circuit and the District Judge below gave careful consideration to the previous decision by the Court of Appeals for the Seventh Circuit, the District Judge observing that he felt constrained to follow the Seventh Circuit **if the evidence warranted it.** In their opinion (Appendix A, p. iii) the Fourth Circuit said that:

> "* * * to avoid unnecessary conflict between the Circuits, we deemed it our duty to address ourselves independently and with special care to an examination of the District Court's findings. Of course, our review is of the record made in the District Court below, which is **different** from the *Goodrie* record, and appears to be more detailed and comprehensive." (Emphasis supplied.)

This Court has held that a holding by a Court of Appeals with respect to patent validity is not binding in a later case even in the same circuit, if the record in the later case is different. *Triplett v. Lowell*, 297 U. S. 638.

The Court of Appeals for the Seventh Circuit predicated its decision essentially on the prior British Felten patent and said (Appendix B, page xxiv) that it had "the benefit of tests in open court." Those tests were necessarily crowded into part of the time permitted for an appellant's argument and were observed by the court only from the bench at a considerable distance. The tests in the Fourth Circuit were demonstrations of transparent and cut away models of the Felten and Aghnides devices constructed so that the Court could see what actually takes place inside the devices when they are operating, rather than having to reach conclusions based on the apparent results, as the Seventh Circuit was forced to do on the record before it.

By means of the new and different demonstrations in the Fourth Circuit, it was visually shown that the conclusions in the Seventh Circuit were contrary to fact (PA 96-100, 103-104, 107-111).

As stated by the Court of Appeals for the Fourth Circuit (Appendix A, page iii):

> "After a long trial and many experiments conducted in his presence in the courtroom, District Judge Hayes concluded that Felten operated on a different principle and did not achieve the result of Aghnides. One after another of the observations made in the Goodrie opinion, suggesting similarities between Felten and Aghnides, were fully answered by highly persuasive visual evidence to the contrary."

Petitioner's contention that the Seventh Circuit's statement that "Felten reads literally on the claims of Aghnides" stands unchallenged, is a mere play on words. The Fourth Circuit says (Appendix, page v) that Felten does not anticipate the Aghnides patent; that the drawings are different; that Felten operates on a different principle;

is designed to achieve a different result; and has never been utilized to achieve the purpose of the Aghnides invention.

Commercial Success.

Petitioner's sta ment that the Fourth Circuit placed great emphasis on commercial success and disregarded the rule of this Court, that commercial success cannot make an invention where there is none, is patently without foundation. The Fourth Circuit merely said (Appendix A, page iv) that the commercial success of the Aghnides aerator was "noteworthy," and recognized that:

> "While it is true that commercial success does not determine either invention or the validity of a patent, nevertheless, in a doubtful case it may be a convincing factor. Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147, 153; Textile Machine Works v. Hirsch Textile Machines, Inc., 302 U. S. 490, 498; Smith v. Ball, 301 U. S. 216, 233."

Felten and Aghnides Differ In Principle.

With respect to the difference in principle of operation between Felten and Aghnides, the Court of Appeals adopted and quoted Finding XXVII (f) of the District Court (Appendix A, page v) which states that in Felten "the energy of water is spent in creating vacuum and not in securing aeration"; that Felten "adds less than 5/10 of a cubic inch of air to 1 cubic inch of water whereas Aghnides' aerator adds 6 cubic inches or 12 times as much"; that Felten secures his result by means of a conically widening chamber which has no counterpart in Aghnides; that Felten "must keep his chamber flooded," whereas the chamber in Aghnides is not a widening one and was not flooded but contained only naked water jets in free air

striking his resistance screens; and that Felten's baskets are not essential to his operation and are not elements corresponding to Aghnides' essential resistance screens or shoulders.

Plainly, these findings show unmistakably and with great particularity the difference in principle between Felten and Aghnides. The Court of Appeals for the Fourth Circuit summed it up as follows (Appendix A, page vii):

> "The foregoing findings are supported by substantial evidence, pointed and convincing, and we are persuaded that they should not be set aside. They show that while in Felten some air was present, increase in the amount of air would defeat the operation of the device, since what was desired was a vacuum; whereas in Aghnides the presence of a large quantity of air was desired to effect aeration, which is the heart of the invention."

With respect to quantitative results, petitioner attempts to show that Felten and Aghnides are the same by comparing the results obtained by testing the Felten device in open court with the statements Aghnides made in his foreign patents as to the results he **expected** his aerator to obtain. Clearly, the proper comparison of results is with the models of Aghnides tested in open court, which showed that the jet produced by the aerator of Fig. 4 of the Aghnides patent contained 81.1% (4.3 cu. in. / 5.3 cu. in.) by volume of air, and the jet produced by the Springflo commercial Aghnides aerator contained 85.6% (6 cu. in. / 7 cu. in.) by volume of air (2 App. 217).

Fig. 8 of the Patent.

The question of the possible effect of Figure 8 of patent 2,210,846 upon the claims thereof was considered fully by the Court of Appeals for the Fourth Circuit on

two occasions: once on the appeal and again on the petition for rehearing of which specific subject was alleged error in the court's ruling on Figure 8.

The only reference to Figure 8 by the Court of Appeals for the Seventh Circuit was an inferential one wherein the court said merely that one form of Aghnides may be used as a vacuum pump.

On the appeal the Fourth Circuit held (Appendix A, page ix):

> "* * * The complete answer is that the claims are not directed to this figure and do not read upon it any more than they read upon Felten. The scope of the claims is controlling, not the figures in the drawing.
>
> "* * * Whether the forms not covered by the surviving claims remain in the patent or are cancelled from the drawings is immaterial, for the claims, and not the drawings, control. We consider it immaterial that Figure 8, which is not covered by any of the claims, was not omitted in the granted patent. *Denominational Envelope Co. v. Duplex Envelope Co.*, 4 Cir., 80 F. 2d 186, 192; *Bassick Co. v. Faultless Caster Corp.*, 7 Cir., 105 F. 2d 228, 231; see also *Freedman v. Friedman*, 4 Cir., 242 F. 2d 364."

These cases cited by the Fourth Circuit fully answer petitioner's contentions with respect to file wrapper estoppel, which contentions amount to an attempt to make Figure 8 into something it actually isn't, by likening Figure 8 to the other figures in the patent. The above cases hold that it is the language of the claims which controls, and not statements of the solicitor in the course of the Patent Office proceeding to obtain the patent. See also *Auto Pneumatic Action Co. v. Kindler & Collins*, 247 F. 323 (C. A. 2, 1917).

In their opinion denying the petition for rehearing the Fourth Circuit again reiterated that the claims of the

patent do not relate to Figure 8 (Appendix A, page xviii). Aghnides testified at length both with respect to Figure 8 and with respect to Felten. He gave reasons why both were vacuum pumps as distinguished from aerators (PA 52-53).

The Patent Office cited Felten and yet the Board of Appeals allowed the claims. Clearly, it did not think they read on Felten.

Actually, Figure 8 is mere surplusage in the patent carried over from the earlier patent application of which the one resulting in the patent, after many changes in the claims, was a continuation in part. As observed by the Fourth Circuit (Appendix A, page ix):

> "When an application for a patent is filed, many forms may be shown and an attempt made to cover them all in the claims as originally presented. During the prosecution of the application, however, the claims may be restricted in the light of the prior art. In the end, only certain of the forms shown may be covered by the restricted claims."

The cases cited by petitioner in an attempt to create a conflict with the Court of Customs and Patent Appeals are not in point.* They do not cover situations where a figure

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* The issue in the *Application of McCarn*, 212 F. 2d 797, 799, was whether a minor modification consisting of an abrupt difference in rate of pitch of a two-part screw was patentable over one having a gradual difference, where the specification stated that the rate of pitch would "depend upon convenience."

Application of Stewart, 222 F. 2d, 747, 754, relates to a chemical, not a mechanical, invention and involves the equivalency of using a spray or a wash in a process for washing a water-soluble emulsion from a plate, where the specification did not indicate any difference. The case relies upon the doctrine of equivalents set forth in *In re Borcherdt*, 197 F. 2d 550 (CCPA) which is strictly limited to chemical cases.

Application of Lindberg, 194 F. 2d 732, 736, has to do with the equivalency of a hydraulic drive with a mechanical drive, where the hydraulic drive was one element in a claimed com-

disclosed in an original application was not covered by the claims which finally issued in a continuation application, and the specification shows that the figure is not an equivalent.

III. No Decision Is Required by the Supreme Court to Forestall Excessive Future Litigation.

Petitioner's contentions with respect to excessive future litigation involving Patent 2,210,846 have already been disposed of by pointing out that the only two cases still pending involving the patent, concern parties hereto or their privies. These are cases brought not by Aghnides or Chase, but by Melard Mfg. Corp., who is bound by the Fourth Circuit decision.

CONCLUSION.

We respectfully urge that the petition be denied.

Respectfully submitted,

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(Continued from preceding page)

bination of elements comprising a spraying device, where a claim of the application broadly covered both a hydraulic and a mechanical drive, and the specification indicated that the two drives were equivalent.